UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

STERICYCLE, INC.,	)		
	)		
Respondent,	)	Case Nos.	04-CA-137660
	)		04-CA-145466
And	)		04-CA-158277
	)		04-CA-160621
	)		
Teamsters Local 628,	)		
	)		
Charging Party	)		

RESPONDENT'S MOTION TO DISMISS AND RESPONSE TO GENERAL COUNSEL'S MOTION IN LIMINE

NOW COMES Stericycle, Inc., Respondent herein, and files its Motion to Dismiss and Response to General Counsel's Motion in Limine as follows:

INTRODUCTION

As set forth in the General Counsel's motion, Respondent's Answer raises the following affirmative defense:

EIGHTH DEFENSE

> The Second Consolidated Complaint is tainted by the involvement of the Regional Director of Region 4 and should be transferred to a different region for independent review, reconsideration, and processing. As reflected in the report issued by the Inspector General in OIG-I-516, the Regional Director for Region 4 has a substantial conflict of interest as a result of his service as Chairman of the Peggy Browning Fund from 2011 until August 2015, when he was compelled to resign his position with the Fund. Although the Regional Director has indicated in the Second Consolidated Complaint that he has recused himself from this matter, he did not recuse himself from the issuance of the original Complaint (04-CA-137660) on January 27, 2015 or the issuance of the Consolidated Complaint (04-CA-137660, 04-CA-145466) on April 3, 2015. Thus, these proceedings are inherently tainted, and the only appropriate remedy

is to transfer the matter to a different Region for independent review, reconsideration, and processing.

Respondent also filed with the General Counsel a motion seeking to have the complaints withdrawn and the entire proceeding transferred to a different region for reinvestigation, reconsideration, and further processing. At this time, no ruling on this motion has been received.

Before addressing the substantive issues, it is appropriate to set forth what relief Respondent actually seeks, what is and is not at issue, and what Respondent seeks to "litigate." The General Counsel's motion distorts these matters.

FIRST, Respondent does not seek an order requiring the General Counsel to transfer this proceeding or take any specific action at all. Respondent does not believe that the ALJ (or the Board for that matter) has the authority to compel the General Counsel to transfer a proceeding or withdraw a complaint. Those are prosecutorial decisions that rest exclusively with the General Counsel. The General Counsel will either grant or deny Respondent's motion, and that ruling will be subject to possible review in a federal court of appeals should this case eventually come before a court.

SECOND, although the ALJ and Board do not have the authority to compel action by the General Counsel, they do have the authority—indeed responsibility—to evaluate and rule upon due process issues that are raised regarding the proceeding that is before them. This includes the power to dismiss a complaint based upon fundamental violations of due process. That is the relief Respondent seeks in this proceeding. Of course, the General Counsel has the power to remove this issue by granting Respondent's motion, withdrawing the complaints, and transferring the proceedings. However, if effective relief is not obtained from the General Counsel, Respondent seeks an order of dismissal.

THIRD, Respondent is not seeking to "litigate" the quality or adequacy of the General Counsel's investigation. Respondent's defense has nothing at all to do with the quality or thoroughness of the investigation or the merits of the allegations set forth in the complaints. Thus, Respondent has no intention of calling Regional personnel as witnesses or subpoenaing documents related to the investigation.

FOURTH, what Respondent does seek to "litigate" is its affirmative defense that the proceedings are inherently tainted and that Respondent has been denied its constitutional due process right to an impartial prosecutor. As discussed herein, this is an issue that is always ripe for litigation and determination in a judicial forum. Indeed, if Respondent did not seek to litigate this issue, it undoubtedly would waive any future ability to raise the issue before a federal court of appeals. 29 U.S.C. § 160(e).

FIFTH, the scope of Respondent's "litigation" of this defense will turn largely on the General Counsel's willingness to stipulate the relevant facts. (1) The Regional Director's involvement with the Peggy Browning Fund and the conflicts raised by this relationship are fully set forth and established in the report issued by the Inspector General in OIG-I-516 on November 9, 2015. [Attachment A]. Unless the General Counsel intends to dispute the accuracy or validity of the findings made by the Inspector General in this report, Respondent will simply introduce the report, and there will be no need to present further evidence on the Regional Director's relationship with the Peggy Browning Fund. (2) The Director's intimate involvement in issuing the original Complaint and the Consolidated Complaint do not appear to be disputed. He personally signed the initial Complaint, and the General Counsel's motion does not appear to dispute his involvement in the Consolidated Complaint. Respondent is willing to accept the representation that he recused himself from the issuance of the Second Consolidated Complaint.

Thus, unless the General Counsel contends that the Regional Director recused himself at some earlier point in time, the facts can be easily stipulated and there are no disputed facts to litigate on this particular subject. (3) The only material fact that is somewhat unclear, at this point, is the exact nature of the Director's conflict in this specific proceeding that eventually led him to recuse himself. The fact that he recused himself demonstrates that a conflict existed, but it does not establish the precise conflict. Respondent assumes that the Director's role in the Peggy Browning Fund brought him into some type of inappropriate contact (i.e., soliciting contributions) with one or more participants in this proceeding, either the Charging Party or its legal counsel. If the General Counsel will explain the specific conflict, it is highly likely that a factual stipulation can be reached that disposes of this specific issue.

SIXTH, assuming that the facts described above can be stipulated, the issue becomes a legal one that Respondent is entitled to raise, preserve, and argue. That is what Respondent seeks to do.

ARGUMENT

A. Respondent Has A Due Process Right To A Disinterested Prosecutor.

The "requirement of a disinterested prosecutor" is well established. *Young v. United States ex rel. Vuitton et Fils S.A.,* 481 U.S. 787, 807 (1987); *accord, United States v. Spiker,* 2016 WL 2587157 (11th Cir. 2016). This Due Process Clause right applies not only in criminal proceedings, but also in administrative proceedings. *Marshall v. Jerrico, Inc.,* 446 U.S. 238, 249 (1980). "[T]he decision to enforce—or not to enforce—may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is ultimately vindicated in an adjudication." *Id.* "A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts

raise serious constitutional questions." *Id.* at 249-250. "The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." *Young,* 481 U.S. at 803 (quoting EC 7-13 of ABA Model Code of Professional Responsibility (1982)).

Given the constitutional nature of the issue raised herein, the General Counsel's reliance upon cases such as *Redway Carriers,* 274 NLRB 1359 (1985); *Barstow Community Hospital,* 352 NLRB 1052 (2008); *IBEW Local 1316 (Superior Container),* 271 NLRB 338 (1984); and *TNT Logistics North America,* 346 NLRB 1301 (2006) is misplaced. (Motion at 4-5). These cases involved complaints about the quality of the General Counsel's investigation. No constitutional due process right was asserted. As noted above, Respondent's defense is unconcerned with the quality of the investigation.

B. The Constitutional Violation Is Clear And Has Not Been Effectively Remedied.

The General Counsel advances multiple contentions aimed at showing that there is no real harm and that any harm that has occurred has been effectively remedied. None of these contentions has merit.

Initially, Director Walsh's conflict is indisputable, not merely theoretical. As set forth in the Inspector General's report:

> The [Director] was the Chairman of the Peggy Browning Fund, an entity that can only act through its officers and directors. The [Director] allowed his name and his employment at the NLRB to become an integral component of the Peggy Browning Fund's image, and he did so for the purpose of enhancing the ability of the fund to solicit donations from entities and individuals associated with organized labor. The [Director] appeared at networking events with a name badge that directly linked his position as the Board of Directors' Chairman to his position as the NLRB's Region 4 Director. The [Director's] name and employment at the NLRB were used on the Peggy Browning Fund's appeals for donation on its Web site and in its newsletters. Any one of these facts is bad, but taken together they created the perception that the [Director's] official actions could be influenced in exchange for support of the Peggy Browning Fund. The local union officials and their representatives make a donation, get drinks and

> dinner, and hang out with the decision-maker for their NLRB cases. Under these circumstances, why wouldn't a rank and file unit member who filed a duty of fair representation charge or a charged employer perceive that the union officials had some special access to the NLRB process? It is a perfectly reasonable and logical assumption. Unfortunately, it is a perception that could taint over half of the charges in Region 4 and the work of its staff.

(Report at 10-11).

In an attempt to minimize the issue, the General Counsel first argues that "both parties will have ample opportunity to present evidence regarding whether the Respondent violated the Act before an impartial finder of fact." (Motion at 5). This is true but irrelevant. The due process violation does not turn on the ultimate merits of the prosecution. It is the absence of a disinterested prosecutor that violates due process. As the Supreme Court has observed:

> A prosecutor exercises considerable discretion in matters such as the determination of which persons should be targets of investigation, what methods of investigation should be used, what information will be sought as evidence, which persons should be charged with what offenses, which persons should be utilized as witnesses, whether to enter into plea bargains and the terms on which they will be established, and whether any individuals should be granted immunity. These decisions, critical to any prosecution, are all made outside the supervision of the court.

Young, 481 U.S. at 807.

It is the prosecutor's extensive discretion, largely unregulated, that is the source of the harm. When the individual exercising this discretion is not disinterested, the harm is "pervasive" and cannot be limited to a "discrete prosecutorial decision." *Young, supra,* 481 U.S. at 812. This harm cannot be undone simply because the ultimate adjudicator is disinterested.

The General Counsel next contends that the affidavit submitted by Leticia Pena demonstrates that an independent assessment of Charges 04-CA-137660 and 04-CA-145466 has occurred, thereby providing the relief that Respondent seeks. Again, however, this contention misses the mark. Pena indicates that she was Acting Regional Director of Region 27 from

October 2015 through April 201[6] (Respondent assumes that the April 2015 date was a typographical error) and that she was asked on December 29, 2015 to review Director Walsh's decision to issue complaint in Cases 04-CA-137660 and 04-CA-145466. Following such review, on January 11, 2016, she "determined that Regional Director Walsh made a legally supportable determination to issue complaint in these cases." Even accepting Pena's representations at face value, they fail to establish that due process has been satisfied. That a decision to issue complaint is "legally supportable" merely means that a reasonable prosecutor would be justified in bringing a prosecution. It does not mean that a reasonable prosecutor would be required to bring a prosecution, nor does it preclude a reasonable prosecutor from declining to issue complaint on some or all of the allegations. Further, the standard is not that of a "reasonable prosecutor." Respondent was, and is, entitled to a *disinterested prosecutor* and the *disinterested* exercise of discretion. Whether that discretion was exercised *reasonably* is wholly irrelevant.

It is clear from Pena's affidavit that neither she nor Region 27 has any actual responsibility for the prosecution of this case. Neither she nor her office conducted the investigation, took affidavits, or has any apparent role in the upcoming hearing. Her review was purely academic in nature and involved no exercise of discretion. Notably, these two charges were scheduled for hearing in April 2015, but the hearing was postponed indefinitely on the date of the hearing based on private settlement discussions between the Union and Respondent. Thus, Region 04—acting under Regional Director Walsh's supervision—had completely planned and prepared the prosecution long before Pena performed her rather perfunctory review in January 2016.

Pena's assertion that she "ratified" Walsh's decision to issue the initial two complaints is without any legal import. It is not at all clear under what authority Pena, a mere Acting Regional

Director in Region 27, could ratify a decision made by an actual appointed regional director in Region 04. This is particularly true since Pena never acquired any actual responsibility for the prosecution of these charges, which remains exclusively in the hands of Region 04 personnel. Further, the constitutional violation does not flow merely from the issuance of the complaints. It flows from the fact that all of the discretionary decisions that are inherent in any prosecution were made and directed by an interested prosecutor. Merely ratifying the issuance of the complaints has no meaningful curative effect.

That brings us to the General Counsel's final contention, which is that Walsh's conflict cannot be imputed to other personnel in Region 04 and his recusal does not require the recusal of all Region 04 personnel. (Memo at 6). For this proposition the General Counsel relies upon a May 10, 2016 Memorandum from Anne Purcell, Associate General Counsel, Division of Operations-Management, which in turn relies upon the ABA Model Rules of Professional Responsibility and case law holding that it is generally not appropriate for a court to disqualify an entire government office because of one attorney's personal conflict. None of these precedents support the General Counsel's position.

Initially, because the issue here is the constitutional due process right to a disinterested prosecutor, not mere rules of ethics, the Model Rules are of limited import. However, assuming that they have some general relevance, the provisions relied upon by the General Counsel are not even applicable here. The General Counsel concedes that if a private law firm were involved, the conflict of one attorney would be imputed to the entire firm. He further concedes that "a government law office is ordinarily considered to be a 'firm' for purposes of the legal ethics rules." However, the General Counsel relies upon Model Rules 1.10 and 1.11 for the proposition that there is no imputation of conflicts in a government office. This is an overstatement of these

rules. Rule 1.11 addresses only those conflicts that arise when attorneys transfer back and forth between public office and private practice. With respect to current government officials such as Director Walsh, Rule 1.11 (d) simply prohibits participation in any "matter in which the lawyer participated personally and substantially while in private practice or nongovernmental employment, unless the appropriate government agency gives its informed consent, in writing." Comment 11 to Rule 1.10, in turn, merely provides that "[u]nder Rule 1.11(d), where a lawyer represents the government after having served clients in private practice, nongovernmental employment or in another government agency, *former client conflicts are not imputed to government lawyers associated with the individually disqualified lawyer."* (Emphasis supplied). These rules clearly have no applicability here. Director Walsh's conflict has nothing at all to do with former clients in non-government service. Indeed, Director Walsh is a career agency employee who has not been in private practice since 1994. Director Walsh's conflicts arise out of his current employment as Regional Director of Region 04, and they are subject to the general rule of imputation set forth in Rule 1.10 (a).

The sole exception to this rule of imputation recognized by the Model Rules is where "the prohibition is based on a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." Rule 1.10(a)(1). Again assuming that the Model Rules are relevant to this constitutional due process question, this exception clearly cannot be satisfied here. The most significant problem here is that Director Walsh did not recuse himself until after he had already directed the investigation of the two charges in question, personally made the decision to issue complaints, and supervised the preparation of these cases for trial all the way up to a hearing date. At that point, it was simply too late for Director Walsh to extricate himself or his conflicts

from the prosecution of these charges. He was like the chef who had planned and prepared the meal, only to step aside and let someone else supervise the serving of the meal. Director Walsh's position in Region 04 cannot be ignored. He is not merely an attorney in a government office. He is the chief officer of that office. Everyone within that office is subordinate to him. Had he recused himself immediately upon the filing of the charges, his biases and conflicts might easily have been screened out of the process. But he did not do so, and he cannot now step aside and disclaim any responsibility for the prosecution any more than the chef who planned and prepared the meal could disclaim responsibility for the meal that someone else served.

To be sure, the disqualification of an entire government office may be disfavored, but the circumstances here are unlike any of the cases cited by the General Counsel. All of these cases involved situations where the conflicted attorney was recused or disqualified either before the prosecution was initiated or at a very early stage in the prosecution. Further, the conflicts in these cases, for the most part, predated the attorney's government employment. [See cases cited at note 15 in Purcell Memorandum]. The General Counsel's reliance upon *United States v. Basciano,* 763 F. Supp. 2d 303 (E.D. N.Y. 2011) is also misplaced. In that case, the United States Attorney's Office had asserted in a RICO case against the defendant that the defendant had threatened to murder a specific assistant attorney in a separate prior prosecution. The defendant argued that this allegation required disqualification of the entire office in a subsequent, separate prosecution. The United States Attorney's Office, however, "repeatedly represented that [the threatened attorney] has not participated in [the subsequent prosecution.]" *Id.* at 313. In these circumstances, the court denied the defendant's motion. Unlike *Basciano*, however, we have no representation that Director Walsh has not been involved in this prosecution. To the contrary, his fingerprints are all over this prosecution.

The right to a disinterested prosecutor is fundamental, not merely at the actual trial, but at all stages of the prosecution. The effects of an interested prosecutor "are pervasive" and the presence of such a prosecutor "calls into question, and therefore requires scrutiny of, the conduct of an entire prosecution, rather than simply a discrete prosecutorial decision." *Young, supra,* 481 U.S. at 812. "A prosecution contains a myriad of occasions for the exercise of discretion, each of which goes to *shape* the record in a case, but few of which are *part* of the record." *Id.* at 813 (emphasis included in original). The Supreme Court has made clear that once a conclusion has been reached that the prosecutor was "subject to influences that undermine confidence that a prosecution can be conducted in a disinterested fashion . . . we cannot have confidence in a proceeding in which this officer plays the critical role of preparing and presenting the case for the defendant's guilt." *Id.* at 811. That is precisely the situation presented herein.

CONCLUSION

It is up to the General Counsel to determine what remedial steps he will take and whether or not he will transfer this proceeding to a different region for reinvestigation and further processing. However, it is the responsibility of the ALJ in the first instance to determine whether whatever steps the General Counsel does take are sufficient to ensure Respondent's fundamental constitutional right to a disinterested prosecution. Respondent contends that under the Supreme Court's precedents, a disinterested prosecution cannot occur if Region 04 continues to prosecute this case. The only solution that will reasonably permit the taint of Director Walsh's extensive involvement in the planning and preparation of this prosecution to be removed is to dismiss the pertinent complaints without prejudice. The General Counsel will then be free to reinvestigate these charges under the direction of a genuinely disinterested prosecutor.

Respectfully submitted this 19th day of May 2016.

/s/ Charles P. Roberts III

Constangy, Brooks, Smith & Prophete LLP
100 N. Cherry Street, Suite 300
Winston-Salem, NC 27101
Tel: (336) 721-1001
Fax: (336) 748-9112
croberts@constangy.com

CERTIFICATE OF SERVICE

I hereby certify that on this day, I served the forgoing MOTION by electronic mail on the following parties:

Lea Alvo-Sadiky
Field Attorney
NLRB – Region 04
615 Chestnut Street
Suite 710
Philadelphia, PA 19106-4413
Lea.Alvo-Sadiky@nlrb.gov

Claiborne S. Newlin
Meranze, Katz, Gaudioso & Newlin, PC
121 S. Broad Street, 13th Floor
Philadelphia, PA 19107
cnewlin@meranzekatz.com

This the 19th day of May 2016.

s/ Charles P. Roberts III